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In the Supreme Court of the United States

OCTOBER TERM, 1926

No. 307

C. A. HUDSON AND R. R. BROGAN, PETITIONERS

v.

THE UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE UNITED STATES

OPINION BELOW

The opinion of the Circuit Court of Appeals (R. 23) is reported in 9 F. (2d) 825.

JURISDICTION

The judgment to be reviewed was entered by the Circuit Court of Appeals December 3, 1925. (R. 25.) Petitions for certiorari were filed March 2, 1926. The writ was allowed April 19, 1926. (R. 26.)

THE QUESTION

The question presented is whether on receiving a plea of *nolo contendere* a United States Court

may impose a prison sentence. There is no controlling statute, and decision depends on the nature of that plea at common law.

STATEMENT

Petitioners were indicted for using the mails to defraud (R. 3), a crime punishable by fine or imprisonment or both (Section 215, Criminal Code). They entered pleas of *nolo contendere* (R. 19) and were thereupon sentenced to imprisonment in the Atlanta Penitentiary for one year and one day (R. 19). They sued out writs of error from the Circuit Court of Appeals for the Third Circuit, assigning as error that the sentence to imprisonment on a plea of *nolo contendere* was erroneous. (R. 20, 21.) The Circuit Court of Appeals affirmed the judgment and sentence. (R. 25.) The present writs are to review that judgment.

ARGUMENT

SUMMARY

Nolo contendere is not pleadable of right, but only by permission of the court. It is probably not proper to accept it where the punishment is capital. With these exceptions it is the same thing, so far as proceedings on the indictment are concerned, as the ordinary plea of guilty. The only further difference between the pleas is that following a plea of guilty the defendant cannot deny the facts charged when later sued by a private individual, while following nolo contendere he can. Any

sentence (except death) prescribed for the crime charged may be imposed equally on either plea.

The question for decision in this case is the subject of difference in the inferior Federal courts. The court below held in this case that the sentence of imprisonment was proper on the plea. 9 F. (2d) 825. In *Tucker* v. *United States,* 196 Fed 260, the Circuit Court of Appeals for the Seventh Circuit reached the contrary result. The same court at the same time decided *Shapiro* v. *United States,* 196 Fed. 268. That case returned to the District Court, where proceedings under the mandate of the Circuit Court of Appeals resulted in conviction by a jury and another sentence of imprisonment. That judgment was sought to be brought directly to this Court by writ of error. This Court dismissed the writ, because the review asked for was really of the judgment of the Circuit Court of Appeals and so could not be had "otherwise than by proceedings addressed directly to that court." *Shapiro* v. *United States,* 235 U. S. 412. In the course of its opinion this Court stated the substance of the decision in the *Tucker case,* but it is clear that it then neither approved nor disapproved it. The question has not elsewhere been considered by this Court and is therefore at large here for original consideration. Since decision depends on the nature of the plea at common law, it will be convenient to state the common law authorities historically.

I

THE ENGLISH AUTHORITIES

The existence of such a thing as a separate plea of "nolo contendere" rests chiefly on the authority of Serjeant William Hawkins. He says (*Pleas of the Crown,* Book 2, Chapter Thirty-first, "Of Confession and Demurrer"):

> And now I am to consider what is to be done to a prisoner upon his confession; which may be either Express, or Implied.
>
> SECT. 1. An express confession is where a person directly confesses the crime with which he is charged, which is the highest conviction that can be, and may be received after the plea of not guilty recorded, notwithstanding the repugnancy; for the entry is, That the defendant *postea* or *relicta verificatione, cognovit indictamentum.*
>
> SECT. 2. Such a confession carries with it so strong a presumption of guilt, that an entry on record *quod cognovit indictamentum,* etc., in an indictment of trespass, estops the defendant to plead not guilty to an action brought afterwards against him for the same matter. * * *
>
> SECT. 3. An implied confession is where a defendant in a case not capital, doth not directly own himself guilty, but in a manner admits it by yielding to the king's mercy, and desiring to submit to a small fine: in which case, if the court think fit to accept of such submission, and make an entry that the defendant *posuit se in gratiam*

> *regis,* without putting him to a direct confession, or plea (which in such cases seems to be left to discretion), the defendant shall not be estopped to plead not guilty to an action for the same fact, as he shall be where the entry is *quod cognovit indictamentum.*

Hawkins nowhere further carries out his promise "to consider what is to be done to a prisoner upon his confession." If there is a difference between the punishment that may be imposed upon express and upon implied confession it is not stated by him, unless what is quoted above means that upon the prisoner's yielding to mercy "and desiring to submit to a small fine" the court is limited accordingly.

The authorities cited opposite Section 3 (above) in Hawkins (6 Ed. 1787) are two cases in the Year Books (9 H.6.60; 11 H.4.65, 21), Lambard's Justice of the Peace (printed in 1614), Viner's Abridgment, and a case in Farrelly.

The Year Book cases in 11 Henry IV have no apparent bearing on the question. The extract in 9 Henry VI is an argument in the midst of an unrelated case. The matter bearing on *nolo contendere* is as follows (9 Henry VI, 59, at 60). (For the translation counsel are indebted to Professor J. H. Beale of the Harvard Law School.)

> WESTON. If one be indicted for Trespass, and he surrenders and pays a fine, will he be permitted afterwards to plead Not Guilty?
>
> PASTON. (J.) Yes; certainly.

Which was agreed by all the Court.

WESTON. It is of record that he admitted it.

BABBINGTON. If the entry be so, he will be estopped; but the entry is not so, but is thus, that he put himself on the grace of our Lord the King, and asked that he might be allowed to pay a fine (petit se admittit per finem). Therefore if one be indicted for felony, and has a charter of pardon, and pleads it, and prays that it be allowed, this does not prove that he is guilty; but the King has excluded himself (from claiming guilt) by his charter (of pardon). And I and all the Court are against you on this point.

The case cited by Hawkins from Farrelly is believed to be the same as that reported in 1 Salkeld 55 (*The Queen* v. *Templeman*), as follows:

> Upon a motion to submit to a small fine, after a confession of the indictment which was for an assault, Holt, Chief Justice, took a difference where a man confesses an indictment, and where he is found guilty; in the first case a man may produce affidavits to prove *son assault* upon the prosecutor in mitigation of the fine; otherwise where the defendant is found guilty; for the entry upon a confession is only *non vult contendere cum domina regina & pon. se in gratiam Curiae.*

Two differences will be noted between this statement and the statement made by Hawkins: (1) The distinction stated is not between express and implied confession but between any confession and

conviction after trial; (2) on confession (apparently express) the entry is *non vult contendere,* etc., instead of *quod cognovit indictamentum,* as in Hawkins, and therefore the prisoner is not estopped to show that the prosecutor started the affray. In other words, *non vult contendere* is the entry on a plea of guilty and not something different. Nevertheless this case, on account of the use of the words "*non vult contendere,*" is generally cited as authority for a separate plea under that name.

Comyns' Digest (Indictment (K.) Confession) says:

> If the defendant appears, or be brought in by process, he shall confess, or traverse the indictment.
>
> If he confesses the indictment, he admits himself guilty.
>
> * * * * *
>
> And there shall be judgment against him.
>
> And in an action for the same trespass, his confession shall be evidence against him. 9 H. 6, 60.a.
>
> * * * * *
>
> So, a man may *ponere se in gratiam regis,* and pray that he may be admitted by fine. 9 H. 6, 60.a.
>
> And such a confession does not conclude him. 9 H. 6, 60.a.
>
> And he may give affidavits of a first assault, etc., by the prosecutor, for mitigation of the fine. I Sal. 55.

In *Viner's Abridgment* the following appears (Estoppel, F., Vol. 10, p. 435–6):

28. In trespass the defendant pleaded *not guilty,* and the plaintiff estopped him, *because he was indicted thereof at another time, and traversed it, and said it was of the assault of the plaintiff,* and so to issue, and after waived it and confessed the traverse, and held that this confession is good estoppel to plead not guilty, and also to justify de son assault demesne, so that he shall not plead the one nor the other contrary to his confession. Br. Estoppel, pl. 64, cites 11 H. 4, 65.

* * * * *

35. *If a man indicted of extortion or trespass puts himself into the grace of the king,* and *makes fine,* and *after the party sues* against him thereof *by bill or writ,* and he pleads not guilty, he shall have the plea, and the making of fine to the king shall not estop him. Br. N. C. Pemp. H. 8, pl. 367 (bis.).

36. *For* the *entry* is *quod pettit se admitti per finem,* and *does not confess it precisely,* and therefore it is no estoppel. But Brook seems to make the fine by protestation that he is not guilty, and then this is all clear. *Ibid.*

Sir Matthew Hale (*Historia Placitorum Coronae*) says nothing indicating that he thinks "nolo contendere" has a separate existence. He sets out (Vol. 2, Chap. 29) two forms of confessions, but they are not express and implied, as in Hawkins, but "either simple, or relative in order to the attainment of some other advantage." A "simple" confession is, of course, a plea of guilty. The other form "is either where the prisoner confesseth the felony in

order to his clergy, * * * or where he confesseth the offense, and appealeth others thereof, thereby to become an approver, and thereupon to obtain his pardon, if he convict them." There is in Hale's discussion no mention of any other confession than these two, nor any plea resembling the form discussed by Hawkins.

Blackstone is equally silent as to the existence of this plea. He treats criminal pleading in some detail (Book IV: Chap. 25, of Arraignment and its Incidents; Chap. 26, of Plea, and Issue), but makes no reference to *nolo contendere* or to anything that might be the same thing.

Chitty reproduces substantially the statement made by Hawkins. He says (*The Criminal Law*, Vol. I, pages 428, 431):

> The last incident of the arraignment is confession. This may be either express or implied. An express confession of the indictment is, where the party pleads *guilty*, and thus directly, in the face of the court, confesses the accusation. This is the highest kind of conviction of which the case admits. * * *
>
> An *implied confession* is where, in case not capital, a defendant does not directly own himself to be guilty, but tacitly admits it by throwing himself on the King's mercy, and desiring to submit to a small fine, which the court may either accept or decline, as they think proper. If they grant the request, an entry is made to this effect, that the defendant "non vult contendere cum

> domina regina et posuit se in gratiam curiae," without compelling him to a more direct confession. The difference in effect between an implied, and an express confession is, that after the latter, not guilty can not be pleaded to an action of trespass for the same injury; whereas it may at any time be done after the former.

The authorities cited in Chitty to support this paragraph are Hawkins, Comyns' Digest, and the case in I Salkeld, all set out at length above, and manuals of Burn and Williams.

This is the extent of the authorities in England. From this point on *nolo contendere* entirely disappears. A fairly careful search through the leading modern English textbooks, digests, and authorities, fails to reveal any reference whatever to the existence of the plea in any book since Chitty. There is, it is believed, at this time no such plea in England.

Having arrived at this conclusion, counsel have endeavored to confirm it by asking the opinion of Sir John Simon, formerly the Attorney General of England. Sir John writes us under date of August 20, 1926:

> The plea to which you refer is unknown in English procedure, and indeed I never heard of it, and do not fully understand what its effect is supposed to be. We have modernized our criminal practice here for purposes of simplicity and speed long ago, and apart from the ordinary plea of

> "guilty" or "not guilty," which is expressed verbally, the only other pleas by a defendant in a criminal case of which I have any knowledge would be a plea of pardon, or previous conviction, or acquittal, or (in criminal libel) of justification and public interest. Even a plea to the jurisdiction need not be formally entered, but can be raised under the general issue. * * * However, you may take it as *quite certain* that in this country these archaic matters have long since been swept away.

The English authority may then be summarized as follows: The existence of *nolo contendere* as something separate from a simple plea of guilty rests ultimately upon two rather ambiguous discussions in the reported cases and practically upon the authority of Hawkins and the older digests. The incidents of the plea, as disclosed by these authorities, were two: (1) It did not estop the defendant to deny the same facts in a civil case, and (2) the defendant threw himself upon the mercy of the court, and "desired to submit to a small fine." It is not stated in any English book so far as we can find that the court, if it accept the plea, is limited to fining the defendant. The defendant desires to be let off with a fine, but he also desires not to be estopped in a private action for the same offence, and therefore he throws himself on the mercy of the court. What the court may then do with him does not appear.

II

THE AMERICAN AUTHORITIES

As a contrast to the complete modern extinction of the plea of *nolo contendere* in England, its use in this country has continued and increased. Some States, indeed, decline to recognize it as not authorized by local codes. But it is elsewhere recognized, and the cases in all States where it is used, as far as we can find, and in the Federal courts except for the one case of *Tucker* v. *United States,* support the proposition that as to all proceedings upon the indictment the plea is the equivalent of that of guilty.

The leading cases are in the New England States. In *Commonwealth* v. *Horton*, 9 Pickering 206, the court said by Mr. Justice Putnam (at p. 207):

> The plea of *nolo contendere* is an implied confession of the offence charged. It is discretionary with the court to receive it, or not.
>
> The advantage which a party obtains by such an answer properly pleaded, is, that he is not estopped to plead *not guilty* to an action for the same facts, as he would be upon a plea of *guilty.* For in the latter case the entry is "*quod* cognovit *indictamentum,*" but in the former, "*non vult contendere cum domina regina, et ponit se in gratiam curiae.*" 2 Hawk. c. 31, Sec. 3, *Queen* v. *Templeman,* I Salk. 55, pl. 6.
>
> Another advantage of the plea of *nolo contendere* was, that the party might be ad-

mitted to prove *son assault* upon the prosecutor, in mitigation of the fine.

In our practice, however, the court will allow a party to offer evidence in mitigation of the sentence, after the plea of *guilty,* and *a fortiori,* after a plea of *nolo contendere.* It is only where the party is sued in a civil action for doing the thing for which he was indicted (as for a trespass, Bro. *Estop. pl.* 132—Vin. *Estop. F, pl. 36*), that the distinction between these pleas is material. The plea of *nolo contendere* pleaded with a protestation that the party was not guilty, would clearly not conclude the party in his defense against the civil action.

But so far as the commonwealth is concerned, the judgment of conviction follows as well the one plea, as the other. And it is not necessary that the *court* should adjudge that the party was guilty, for that follows by necessary legal inference from the implied confession. But the court thereupon proceeds to pass the sentence of the law affixed to the crime.

In *Commonwealth* v. *Tilton,* 8 Metcalf 232, Chief Justice Shaw said for the court (p. 233):

This plea, like a demurrer, admits, for the purposes of the case, all the facts which are well stated, but is not to be used as an admission elsewhere; and upon a motion in arrest of judgment, the only question is, whether the count sets forth any indictable offence.

In *Commonwealth* v. *Ingersoll,* 145 Mass. 381, the statement made in *Commonwealth* v. *Horton* is summarized and substantially repeated. The law in Massachusetts remains the same down to the present day. *Commonwealth* v. *Marino,* 150 Northeastern Reporter, 841 (Feb. 24, 1926).

In *State* v. *Siddall,* 103 Maine, 144, the court said (page 146):

> "A plea of *nolo contendere* when accepted by the court, is, in its effect upon the case, equivalent to the plea of guilty. * * * The judgment of conviction follows upon such a plea as well as upon a plea of guilty, and such a plea if accepted, can not be withdrawn and a plea of not guilty entered except by leave of court." *Commonwealth* v. *Ingersoll,* 145 Mass. 381.

In *State* v. *O'Brien,* 18 Rhode Island, 105, the court said (at page 107):

> The plea of *nolo contendere* interposed by the defendant, like a demurrer, admits for the purposes of the case, all the facts which are well pleaded. That is to say, it is a confession of guilt, so far as this particular case is concerned, and places the defendant in the same position for the purposes of this motion, as though he had pleaded guilty, or been found guilty by the verdict of a jury.

In *State v. Fagan,* 64 New Hampshire 431, the question was whether one who had pleaded *nolo contendere* to a liquor charge . . been fined could be prosecuted for another act of the same sort as

for a "subsequent offence." The court held that he could, saying (p. 432):

> The judgment recovered by the state (upon the former plea) is not a compromise in the sense of being something less than a conviction. It could have been rendered on no other ground than the defendant's guilt. It would be invalid if the record showed that he was not guilty, or that the question of his guilt had not been determined against him by plea or by proof. His plea was an implied confession of the offence charged. His guilt was a "necessary legal inference from the implied confession."

In *United States* v. *Hartwell,* Fed. Case No. 15318, the Circuit Court for the District of Massachusetts, upon questions arising on the trial of accessories after plea of *nolo contendere* by the principal, said (26 Fed. Cas. at p. 201):

> Attempt was made at the argument to set up a distinction between the plea of nolo contendere and the plea of guilty, but the suggestion is entitled to no weight as it is well settled that the legal effect of the former is the same as that of the latter, so far as regards all the proceedings on the indictment.

In *Gemignani* v. *United States,* 9 F. (2d) 384, in the Circuit Court of Appeals for the Sixth Circuit, the question was whether one who had pleaded *nolo contendere* to one indictment and been fined could for a later offense be indicted as one before convicted. The court said:

> This plea of nolo contendere was entered as to each count of that indictment, and for the purpose of that case was, in effect, a plea of guilty to both counts.

In none of the cases so far cited does it appear that the defendant was in fact sentenced to imprisonment. That has, however, occurred in sundry other cases and been affirmed in the appellate courts.

In *United States* v. *Lair*, 195 Fed. 47, the Circuit Court of Appeals for the Eighth Circuit denied *habeas corpus* to a prisoner sentenced for two years after pleading *nolo contendere*. The point now made does not seem to have been urged upon the court, whose opinion is chiefly concerned with the sufficiency of the indictment to show jurisdiction. As to the plea the court said (p. 52):

> In fact, the defendant admitted that he committed the offense charged within that district; for his plea of nolo contendere is in effect a plea of guilty to every essential element of the offense well pleaded in the charge against him, and warrants his conviction thereof without more (citing cases) though the conviction can not rightly be used against him in any other case. Such is the effect of the plea of nolo contendere.

In *Commonwealth* v. *Holstine*, 132 Pennsylvania 357, the court approved a sentence to both fine and imprisonment upon this plea, saying simply (p. 361):

> To this indictment he pleaded non volo contendere. This, although not technically a

> plea of guilty, is so in substance, and justifies the court in imposing sentence: *Buck* v. *Commonwealth,* 107 Pa. 486.

In *Commonwealth* v. *Ferguson,* 44 Pennsylvania Superior Court 626, the defendant, on a plea of *nolo contendere,* had been sentenced to imprisonment. He assigned as error that only a fine could be imposed upon the plea, but the court affirmed the sentence. The court said (p. 629):

> It would seem that at one time in England the plea was accepted only in cases where a fine was to be imposed: 2 Hawkins P. C. c. 31, Sec. 3. But in none of the above cited American cases is it decided that if the court accepts the plea, and the offense is punishable by imprisonment, the defendant may not be sentenced to imprisonment. On the contrary, the sentence under consideration in *State ex rel.* v. *Hudson Q. S.,* 46 N. J. L. 112, as well as *Com.* v. *Holstine,* 132 Pa. 357, was to imprisonment. (Quotation from the *Holstine case.*) This clearly implies that the sentence would have been supported by the plea even if the facts of the case had not been brought on the record.

In *Commonwealth* v. *Shrope,* 264 Pennsylvania 246, the principles of these cases were sought to be pushed to extreme limits and reaction resulted. Shrope was indicted for murder and tendered the plea of *non vult contendere,* which the court accepted. A statute provided that where defendant

was "convicted by his own confession" the court without a jury should take evidence to determine the degree of guilt. The trial court proceeded under this statute, determined that Shrope's crime was murder in the first degree, and sentenced him to death. On appeal the court held that *nolo contendere* could not be pleaded in a capital case, and accordingly reversed the judgment and ordered that the accused be permitted to plead over. The court said (at page 249):

> That the plea of non vult contendere is allowable in our jurisdiction, when entered with the leave of court, is conceded. Our reports contain a number of cases where it has been allowed, and the recognition it has received in them is too emphatic to dispute its admissibility under certain conditions; but this court has yet to recognize its applicability beyond cases involving, at most, imprisonment as the penalty, and in allowing it to this extreme limit we have extended it by judicial construction beyond the purpose for which it was originally intended and designed, which was simply to enable one charged with a misdemeanor to commute the penalty affixed by the payment of a fine.

The court's principal authorities for this statement are the passages from Hawkins and Chitty above quoted.

In *State ex rel. Peacock* v. *Judges,* 46 New Jersey Law, 112, Peacock was indicted, pleaded *nolo contendere,* and was sentenced to state prison. He

sued out a writ of error and applied for bail, which the lower court refused, and that refusal was affirmed. The court said (at page 113):

> A plea of *nolo contendere* is an implied confession of the crime of which he is charged. I Burn's Just. 388; 2 Hawk. P. C. 225. The difference between this implied confession and the express confession by plea of guilty is, that after the latter "not guilty" can not be pleaded to an action of trespass for the same injury, whereas it may at any time be done after the former. I Chitty Crim. Law 293. In fact, the only difference between the significance of the two pleas is in the force each has upon a collateral proceeding. The implied confession is only for the purpose of the prosecution in the course of which it is entered, while the plea of guilty in that form may be used against the defendant in a civil suit. I Bish. Crim. Pro., Sec. 802; I Whart. Crim. Law, Sec. 533.
>
> In the same cause the established practice is to treat the plea of *nolo contendere* as operating as an admission of the truth of the charge as fully as if the technical plea of not guilty had been interposed. Judgment is entered, execution of the judgment follows, and the right of review to exactly the same extent is accorded to the defendant who has pleaded not guilty as to him who has gained permission to enter the plea of *nolo contendere*.

(We take it that the phrase "not guilty" where it appears twice in the last paragraph is a clear misprint for "guilty.")

In *Philpot* v. *State,* 65 New Hampshire 250, the defendant was denied habeas corpus where he had pleaded *nolo contendere* to a liquor charge and been sentenced to six months imprisonment. The right to take the plea was granted by a statute, which, however, said nothing about punishment, and the present point was apparently not urged upon the court.

In *State* v. *Burnett,* 174 North Carolina 796, defendant pleaded *nolo contendere,* evidence was taken, and she was sentenced to twelve months in jail. The court affirmed the sentence, saying (p. 797):

> A plea of *nolo contendere,* which is still allowed in some courts, is regarded by some writers as a *quasi*-confession of guilt. Whether that be true or not, it is equivalent to a plea of guilty in so far as it gives the court the power to punish. * * *
>
> The only advantage in a plea of *nolo contendere* gained by the defendant is that it gives him the advantage of not being estopped to deny his guilt in civil action based upon the same facts.

In *Ex Parte Lanni,* 131 Atl. 52; 131 Atl. 927 (Rhode Island 1925), it appeared that Lanni was indicted for assault with a dangerous weapon and pleaded not guilty; that he thereafter withdrew that plea and pleaded *nolo contendere;* that he

thereafter applied for permission to withdraw that plea and plead not guilty, and that the trial court refused permission and sentenced him to the state prison. The Supreme Court permitted review by habeas corpus (131 Atl. 52), but declined to disturb the result (131 Atl. 927).

Certain of these decisions are cited in *Tucker* v. *United States*, and are disposed of by the opinion in that case as follows (196 Fed. at 265):

> We believe these mere instances of fact, appearing alone in the facts of the case without comment in the opinion, are not entitled to consideration and force (persuasive or otherwise) as rulings of the courts respectively, that such pleas were accepted under and within the common-law rule, and that they neither control nor aid the inquiry, whether *nolo contendere* was pleadable in the case at bar.

It must, however, be apparent that these courts would not have affirmed the sentence of imprisonment, as each one did, had they been of opinion that it was not permissible upon the plea. It may also be said as to the *Tucker case* that it goes entirely upon the language of Chitty and of Hawkins, and that language does not say, as we have seen, that on acceptance of the plea the court is limited to a small fine, but only that the defendant "desires to submit to a small fine" and throws himself upon the mercy of the court.

These are all the American decisions which seem to counsel to have important bearing on the ques-

tion here presented. We have in addition, in an appendix to this brief, endeavored to collect all of the decisions in this country in which the plea is in any way referred to, with brief statement of the nature of the case and the decision, and have also quoted applicable statements from the principal text writers. It remains to refer to one Federal statute having bearing on the question.

The Probation Act (Act of March 4, 1925, Ch. 521, 43 Stat. 1259) provides in Sections 1 and 2 as follows:

> SEC. 1. That the courts of the United States having original jurisdiction of criminal actions, except in the District of Columbia, when it shall appear to the satisfaction of the court that the ends of justice and the best interests of the public, as well as the defendant, will be subserved thereby, shall have power, after conviction or after a plea of guilty or *nolo contendere* for any crime or offense not punishable by death or life imprisonment, to suspend the imposition or execution of sentence and to place the defendant upon probation for such period and upon such terms and conditions as they may deem best; or the court may impose a fine and may also place the defendant upon probation in the manner aforesaid. The court may revoke or modify any condition of probation, or may change the period of probation: *Provided*, That the period of probation, together with any extension thereof, shall not exceed five years.

While on probation the defendant may be required to pay in one or several sums a fine imposed at the time of being placed on probation and may also be required to make restitution or reparation to the aggrieved party or parties for actual damages or loss caused by the offense for which conviction was had, and may also be required to provide for the support of any person or persons for whose support he is legally responsible.

SEC. 2. That when directed by the court, the probation officer shall report to the court, with a statement of the conduct of the probationer while on probation. The court may thereupon discharge the probationer from further supervision and may terminate the proceedings against him, or may extend the probation, as shall seem advisable.

At any time within the probation period the probation officer may arrest the probationer without a warrant, or the court may issue a warrant for his arrest. Thereupon such probationer shall forthwith be taken before the court. At any time after the probation period, but within the maximum period for which the defendant might originally have been sentenced, the court may issue a warrant and cause the defendant to be arrested and brought before the court. Thereupon the court may revoke the probation or the suspension of sentence, and may impose any sentence which might originally have been imposed.

It seems clear that by this Act the Congress evidenced its understanding that the plea of *nolo contendere* can be received in the Federal courts, and that under it a sentence of imprisonment can be imposed. In Section 1 "after conviction or after a plea of guilty or nolo contendere" makes one phrase, as if the three things had the same effect. In the same section the court is authorized, apparently after any of the three, to suspend sentence and place the defendant on probation, "or the court may impose a fine and may also place the defendant upon probation." By Section 2, if the probationer does not behave himself, he may be brought before the court and sentenced, and this power may be exercised not only during the probation period, "but within the maximum period for which the defendant might originally have been sentenced," clearly showing an understanding that he might have been sentenced for some period, and apparently on *nolo contendere* as well as on conviction or a plea of guilty. Congress in this statute has correctly treated this plea as the same as that of guilty, so far as the criminal proceedings are concerned.

CONCLUSION

This is a question of the common law and must be decided on the basis of the common-law authorities. The plea originated in England, but it has been extinct there for many years, and the old authorities in which it is referred to are in some

respects ambiguous and not entirely consistent with each other. Some of them suggest that the plea arose through a desire of the accused to submit to a small fine, but none of them assert that the power of the court upon acceptance of the plea is limited by that desire any more than it would be upon a plea of guilty. The only differences between the pleas which are supported by the English authorities are these: that *nolo contendere* is pleadable only in a case not capital, that it is pleadable only with the court's consent, and that after it the accused is not estopped to make denial when sued later by a private individual. In all other respects the pleas seem to be identical.

In this country the existence of the plea is supported by many decisions in the State and inferior Federal courts. The State decisions are uniform upon the proposition that the plea when accepted in a case in which it can properly be pleaded has the same effect upon the criminal proceedings as the plea of guilty, and sentences of imprisonment upon plea have been affirmed in several States, with no State decision to the contrary. The inferior Federal courts hold it proper to accept the plea, but there is a difference of opinion as to whether a prison sentence may be imposed upon it. The Probation Act, enacted in 1925, is a legislative recognition of the authority of the Federal courts to accept the plea, and the Act assumes that prison sentences may be imposed upon it. Upon reviewing all of the

authorities, English and American, the correct rule seems to be that the principal difference between this plea and that of guilty relates to the question whether the defendant is estopped to make denial when later sued by a private individual. In the criminal proceedings the only differences seem to be that *nolo contendere* is pleadable only with the court's consent and is not pleadable at all in capital cases. When pleaded in a proper case and accepted by the court its effect is just the same as that of the plea of guilty. A prison sentence may therefore be imposed on one plea as well as on the other. Under these rules the sentences to imprisonment in this case were proper.

One thing more may be suggested. Anyone who makes this plea, as the authorities now stand, intends to admit the facts well charged in the indictment. Upon such admission it should require strong reasons to limit the power of the court in passing sentence. Any special limitation not prescribed by statute and based merely on the form in which the defendant couches his admission, is contrary to the usual principles of criminal administration, and should not be incorporated in the law except upon clear grounds.

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OCTOBER, 1926.

APPENDIX

I

All American decisions referring to *nolo contendere*. (We have referred in the body of the brief to all the English decisions which we have discovered.)

FEDERAL CASES

Shapiro v. *United States,* 235 U. S. 412 (see Brief, p. 3.)

United States v. *Hartwell,* Fed. Case No. 15318 (see Brief, p. 15.)

United States v. *Lair,* 195 Fed. 47 (see Brief, p. 16.)

Tucker v. *United States,* 196 Fed. 260 (see Brief, pp. 3, 12.)

Shapiro v. *United States,* 196 Fed. 268 (see Brief, p. 3).

Hocking Valley Ry. Co. v. *United States,* 210 Fed. 735, holds that upon writ of error after sentence based on this plea the defendant may raise the question whether the acts charged in the indictment constitute a crime.

Stewart v. *United States,* 300 Fed. 769, holds that it is proper, after plea of *nolo contendere* tendered and accepted, but before sentence has been passed, for the court to withdraw its acceptance of the plea and require the defendant to plead over.

Gemignani v. *United States,* 9 F. (2d) 384 (see Brief, p. 15.)

COLORADO

Young v. *People,* 53 Colo. 251, holds that *nolo contendere* is pleadable under the Colorado statute. The court said as to its effect (p. 253):

> Though a plea of guilty, still, we know that in actual practice, in this state, it is generally entered either with the express or tacit understanding of the district attorney, that the court may enter an order dismissing the defendant out of court upon the payment of costs. But it is a plea of guilty upon which sentence may be imposed.

DELAWARE

State v. *Hopkins,* 4 Boyce 306, says (p. 307):

> He pleads *non vult;* that is, he throws himself upon this court to say whether or not he is guilty of an infraction of this law.

ILLINOIS

People v. *Miller,* 264 Ill. 148, holds that under the Illinois code a plea of *nolo contendere* is not permitted.

INDIANA

Mahoney v. *State,* 149 N. E. 444 (1925), holds that under the Indiana code a plea of *nolo contendere* is not permitted.

MAINE

State v. *Lang,* 63 Maine, 215 (at 220), holds it proper, on trial of an indictment for a liquor nuisance, to show a judgment in a prior liquor case, entered on a plea of *nolo contendere.*

State v. *Herlihy,* 102 Maine, 310, holds similar records admissible as affecting credibility of a defendant who takes the stand himself.

State v. *Siddall,* 103 *Maine,* 144 (see Brief, p. 14).

MASSACHUSETTS

Commonwealth v. *Town of Northampton,* 2 Mass. 116, holds that judgment may be arrested after *nolo contendere* when the indictment is defective.

Commonwealth v. *Horton,* 9 Pickering, 206 (see Brief, p. 12).

Commonwealth v. *Tilton,* 8 Metcalf, 232 (see Brief, p. 13).

Commonwealth v. *Grey,* 2 Gray, 501, is the same, on this question, as *Commonwealth* v. *Town of Northampton,* supra.

Statutes of 1855, Ch. 215, Sec. 35: "No admission of the defendant made in court shall be received on the trial without the consent of the prosecutor, except a plea of guilty."

Commonwealth v. *Adams,* 6 Gray, 359, holds that *nolo contendere* can not be received, under this statute, without the consent of the prosecutor; that the consent must appear of record, and if it does not the judgment is erroneous.

Commonwealth v. *Ingersoll,* 145 Mass. 381 (see Brief, p. 14).

Commonwealth v. *Marino,* 150 N. E. 841 (see Brief, p. 14).

MINNESOTA

State v. *Kiewel,* 207 N. W. 646 (1926), holds that under the Minnesota statutes the plea of *nolo contendere* does not exist.

MISSISSIPPI

Williams v. *State,* 130 Miss. 827, holds that ***nolo contendere*** may be pleaded in that State, and the court may impose sentence on the plea.

NEW HAMPSHIRE

State v. *Fagan,* 64 N. H. 431 (see Brief, p. 14).

Philpot v. *State,* 65 N. H. 250 (see Brief, p. 20).

State v. *La Rose,* 71 N. H. 435, holds that in a liquor case a plea of *nolo contendere* to a prior liquor charge is not admissible where not shown to have been followed by conviction.

Collins v. *Benson,* 81 N. H. 10, holds that it is not proper to impeach an expert witness by showing that he once pleaded *nolo contendere* to a charge of larceny.

Lafferty v. *Houlihan,* 81 N. H. 67, holds that in a libel case truth is not proved conclusively by showing that an information was filed against the plaintiff for matters stated in the libel, and that he pleaded *nolo contendere* thereto.

NEW JERSEY

State ex rel. Peacock v. *Judges,* 46 N. J. L. 112 (see Brief, p. 18).

State v. *Henson,* 66 N. J. L. 601, holds that it is proper to inquire of a defendant on cross-examination whether he has pleaded *nolo contendere* to a prior charge of larceny.

State v. *Alderman,* 81 N. J. L. 549, holds that after plea of *nolo contendere* it is not open to defendant to question the sufficiency of the indictment

(under a New Jersey statute providing that such questions must be raised before a plea).

Johnson v. *Johnson,* 78 N. J. Eq. 507, holds that it is proper, in a suit for divorce on the ground of adultery, to show that the defendant husband has pleaded *nolo contendere* to a charge of rape and that that evidence is sufficient proof that he is guilty of adultery.

State v. *Martin,* 92 N. J. L. 436, holds that in a murder case it is not error for the court to refuse to accept the plea *non vult contendere* tendered by defendant.

NORTH CAROLINA

State v. *Burnett,* 174 No. Car. 796 (see Brief, p. 20).

PENNSYLVANIA

Buck v. *Commonwealth,* 107 Pa. 486, holds that on the trial of an accessory a plea of *nolo contendere* by the principal, upon which no judgment has been entered, is not admissible in evidence, since it is not a conviction until judgment entered, but is merely a confession by the principal, which is not admissible against accessories. The court characterized the plea as "a mild form of pleading guilty."

Commonwealth v. *Holstine,* 132 Pa. 357 (see Brief, p. 16).

Commonwealth v. *Ferguson,* 44 Pa. Super. Ct. 626 (see Brief, p. 17).

Commonwealth v. *Jackson,* 248 Pa. 530, holds that where school officers were indicted for accept-

ing bribes, and pleaded *nolo contendere,* with a protestation of innocence, the resulting judgment was nevertheless a "conviction" which forfeited their offices.

Commonwealth v. *Shrope,* 264 Pa. 246 (see Brief, p. 17).

RHODE ISLAND

State v. *O'Brien,* 18 R. I. 105 (see Brief, p. 14).

State v. *Conway,* 20 R. I. 270. In this case the prosecution was permitted at the trial to show that the defendant had pleaded *nolo contendere* on a previous occasion. The statute was that "conviction or sentence for any crime or misdemeanor may be shown to affect his credibility." It appeared that in the prior case defendant had not been sentenced on her plea, but that *nolle prosequi* had been entered on her paying $100.00 to the State by way of compromise. The court held that this was neither a conviction nor a sentence, and that it was error to admit the evidence.

Barker v. *Almy,* 20 R. I. 367, holds that one who pleads *nolo contendere* to an indictment for embezzlement and is sentenced to a fine has been "convicted" of that crime within the meaning of a statute giving the injured party double damages.

Doughty v. *De Amoreel,* 22 R. I. 158, holds that one who pleads *nolo contendere* to an indictment for embezzlement and is not sentenced but is placed under the control of a probation officer is not "convicted" within the meaning of the same statutes.

Ex parte Lanni, 131 Atl. 52; 131 Atl. 927 (see Brief, p. 20).

WISCONSIN

Birchard v. *Booth*, 4 Wis. 67, was a civil action for assault and battery. Evidence was introduced that defendant admitted the battery before a police magistrate. It was claimed that the admission amounted to a plea of *nolo contendere* and was therefore not admissible in evidence in a civil case. The court defined the plea, held that the admission here was different, and that the evidence was proper.

II

TEXTBOOK STATEMENTS

The statements of the older English textbooks are quoted in the brief. The more recent English books contain no reference whatever to the existence of the plea. The following have been examined:

Russell on Crimes, 8th Edition.

Archbold's Criminal Pleading, Evidence & Practice, 26th Edition.

Bowen-Rowlands on Criminal Proceedings.

Halsbury—The Laws of England.

The American textbooks commonly have something on the plea. The statements of the chief books are as follows:

Wharton, Criminal Procedure, Tenth Ed., Sec. 1346:

> The plea of *nolo contendere* has the same effect as a plea of guilty, so far as regards

the proceedings on the indictment; and a defendant who is sentenced upon such a plea to pay a fine is convicted of the offense for which he is indicted.

The advantage, however, which may attend this plea is, that when accompanied by a protestation of the defendant's innocence, it will not conclude him in a civil action from contesting the facts charged in the indictment.

It is held within the discretion of the court to accept such a plea, or to require a plea of guilty or not guilty.

Bishop, New Criminal Procedure, 4th Ed., Sec. 802:

1. This plea (*nolo contendere*) is the defendant's declaration in court that he will not contend with the prosecuting power.

2. It is pleadable only by leave of court, and in light misdemeanors. The difference between it and guilty appears simply to be, that while the latter is a confession binding the defendant in other proceedings, the former has no effect beyond the particular case. It simply justifies the court in imposing its sentence.

Zoline, Federal Criminal Law and Procedure, Sec. 222:

The plea of *nolo contendere* is a declaration on the part of the defendant that he will not contend with the prosecution. Under the common law rule, which governs in our Federal Courts, the plea of *nolo contendere* was in the nature of a motion to submit to a small fine and was taken only in cases of slight misdemeanors. Hence, imprisonment cannot be imposed upon a plea of *nolo contendere.* (Citing *Tucker* v. *United States.*) The plea

is in the nature of a compromise between the government and the defendant. It is not a plea as of right and can only be entered with the consent of the United States Attorney and the court. When accepted by the prosecuting attorney and court, it becomes an implied confession of guilt; and for the purposes of the case only is equivalent to a plea of guilty; but distinguishable from such plea in that it can not be used against the defendant as an admission in any civil suit for the same act. There is no difference in legal effect between the plea of *nolo contendere* and the plea of guilty with regard to all proceedings in the indictment. Although the plea of *nolo contendere* is considered as an implied confession of guilt, it must be kept in mind that cases often arise where an accused person might find himself without witnesses to establish his innocence because of their death, absence or other causes.

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SUPREME COURT OF THE UNITED STATES.

No. 307.—October Term, 1926.

C. A. Hudson and R. R. Brogan, Petitioners, *vs.* United States. } On Writ of Certiorari to the United States Circuit Court of Appeals for the Third Circuit.

[November 22, 1926.]

Mr. Justice Stone delivered the opinion of the Court.

Petitioners were indicted in the District Court for western Pennsylvania for conspiracy to use and for using the mails to defraud, crimes punishable by fine or imprisonment or both (§§ 37, 215 Criminal Code). On pleas of *nolo contendere* they were sentenced to imprisonment for one year and one day. The conviction and sentence were affirmed by the Court of Appeals for the Third Circuit. 9 Fed. (2d) 825. The case is here on certiorari. 271 U. S. 652, Jud. Code, § 240(a), as amended.

The sole question raised by the assignment of error is whether a United States court, after accepting a plea of *nolo contendere*, may impose a prison sentence. It is the contention of petitioners that the plea in effect is conditioned upon the imposition of a lighter penalty; that therefore the court may not accept the plea to an indictment charging a crime punishable by imprisonment only, and if accepted where the crime is punishable by imprisonment or fine or both, it may not accept the plea and ignore the condition by imposing a prison sentence. This contention is supported by *Tucker* v. *United States* (C. C. A. 7th), 196 Fed. 260; *Shapiro* v. *United States* (C. C. A. 7th), 196 Fed. 268; *Blum* v. *United States* (C. C. A. 7th), 196 Fed. 269; in which sentences of imprisonment on the plea of *nolo contendere* were set aside. But in *United States* v. *Lair* (C. C. A. 8th), 195 Fed. 47, *habeas corpus* was denied a prisoner confined for a two-year term upon this plea, but the objection pressed here apparently was neither